

111 FERC ¶ 61,084
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suede G. Kelly.

Xcel Energy Services, Inc.

Docket Nos. ER04-1174-003

Southwest Power Pool, Inc.

ER04-1232-002

Excel Energy Services Inc. and
Southwest Power Pool, Inc.

EL05-41-001

ORDER ON REHEARING

(Issued April 19, 2005)

1. On December 17, 2004, the Commission issued an order accepting Xcel Energy Services Inc.'s, (Xcel) revised tariff sheets, suspending them for five months to become effective May 20, 2005, subject to refund, and establishing hearing and settlement judge procedures.¹ The December 17 Order also accepted Southwest Power Pool, Inc.'s (SPP) revised tariff sheets, suspending them for five months to become effective May 20, 2005, subject to refund and to the outcome of the Xcel hearing and settlement judge procedures.
2. On January 14, 2005, Xcel filed a request for rehearing, arguing that the Commission erred in allowing certain interventions and in establishing a five-month suspension. As discussed below, the Commission denies rehearing. The Commission generally will not reconsider its decision regarding the length of the suspension period, and Xcel has failed to raise any circumstances that would persuade the Commission to depart from this long-standing policy in the instant case.

I. Background

3. In its original filing, Xcel proposed: (1) a change to the transmission revenue requirement and ancillary service rates in the Xcel Operating Companies Joint Open Access Transmission Tariff (OATT); (2) a new Attachment O to the Xcel OATT that sets

¹ *Xcel Energy Services, Inc.*, 109 FERC ¶ 61,284 (2004) (December 17 Order).

forth a formula to be used annually to update transmission rates on the Public Service Company of Colorado (PSCo) and Southwestern Public Service Company (Southwestern Public Service) systems; (3) a change in network transmission charges recovered under PSCo's power sales contracts applicable to Grand Valley Rural Power Lines, Inc., Intermountain Rural Electric Association, Yampa Valley Electric Association, Inc., the Town of Julesburg, Colorado, the City of Burlington, Colorado, and the Town of Center, Colorado;² and (4) a change in rates for network and ancillary services charged to Municipal Energy Association of Nebraska, Tri-State Generation and Transmission Association, Inc., and Cheyenne Light, Fuel and Power Company for use of the PSCo system under the Xcel OATT, and Golden Spread Electric Cooperative, Inc. (Golden Spread) for the use of the Southwestern Public Service system under the Xcel Energy OATT.

4. Additionally, Xcel proposed to increase PSCo's annual transmission revenue requirement by 29 percent from \$72,901,394 to \$94,155,053 and Southwestern Public Service's annual transmission revenue requirement by 6 percent from \$64,200,000 to \$68,089,518. Finally, Xcel proposed to make various changes to its ancillary services rates and proposed a direct pass through of SPP administrative fees for Golden Spread's load to Golden Spread. Xcel stated that this pass through was necessary since Southwestern Public Service incurs the SPP administrative fees on Golden Spread's behalf.

5. SPP filed OATT revisions to track the proposed transmission service rates applicable to the Southwestern Public Service pricing zone proposed in Xcel's filing described above, to take effect coincident with the effective date adopted by the Commission for the Xcel tariff changes.

6. In the December 17 Order, the Commission found that Xcel's proposed tariff revisions raised issues of material fact that could not be resolved based on the record before the Commission. Therefore hearing and settlement judge procedures were established and, because Xcel's proposed rates might be substantially excessive, consistent with Commission precedent, the Commission accepted and suspended the rates for five months to become effective May 20, 2005 subject to refund. Finally, since SPP's proposed tariff revisions implement Xcel's proposed tariff revisions, the Commission accepted and suspended SPP's revisions to also become effective May 20, 2005 subject to refund and the outcome of Xcel's hearing and settlement judge procedures.

² These power sales agreements, which are not part of the instant filings, provide that these requirements customers will reimburse PSCo for the network integration transmission service that PSCo procures for their benefit under the Xcel Energy OATT at stated rates identical to those that would apply if these customers obtained such transmission service directly under the Xcel Energy OATT.

7. Xcel filed a request for rehearing of the December 17 Order.

II. Requests for Rehearing

A. Interventions

1. Rehearing Request

8. Xcel asserts the Commission erred in allowing the New Mexico Attorney General's (Attorney General) and Pioneer Natural Resources' (Pioneer) interventions. Xcel argues that the Commission's order failed to note that it had opposed both motions and that the Attorney General's motion was untimely.

9. Xcel argues that the Commission should reject Pioneer's motion to intervene, asserting that Pioneer does not have any interest that could be directly affected by the outcome of the proceeding. Xcel argues that, contrary to Pioneer's assertion, Pioneer is a retail customer, not a wholesale customer of PSCo or of Southwestern Public Service. Xcel argues that, since Pioneer is only a retail customer, its interest would not be directly affected by the outcome of this proceeding.

10. Xcel argues that the Commission should reject the Attorney General's motion to intervene because good cause did not exist to permit the out-of-time intervention. Furthermore Xcel argues that the Attorney General also does not have any interest that could be directly affected by the outcome of the proceeding. Xcel argues that, contrary to the Attorney General's assertions, retail customers in New Mexico will not be directly affected by the outcome since this is a wholesale rate case. Additionally, Xcel argues that wholesale customers in New Mexico are adequately represented by several other parties in this proceeding which also are capable of representing their retail customers' interests.

2. Discussion

11. Rule 214(c)(2) and (d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.214(c)(2), (d) (2004), expressly allows the Commission to grant opposed and untimely motions to intervene and make the entities that filed them parties to a proceeding. While we mistakenly considered the two interventions to be both unopposed and timely, we have re-examined them under the standards applied to opposed and untimely interventions. We find good cause to grant Pioneer's and the Attorney General's interventions given their interests and as doing so at this early stage of this proceeding will not unduly disrupt the proceeding or unduly prejudice the parties.

B. Suspension Period

1. Rehearing Request

12. Xcel asserts that its proposed rates are not substantially excessive, and consequently a five-month suspension is unnecessary. Xcel contends that the Commission failed to delineate any basis for finding that the proposed rates are excessive. Regarding PSCo, Xcel argues that the Commission failed to provide any explanation as to how it found the proposed PSCo's rates to be substantially excessive since the record demonstrated that, under the currently effective rates, PSCo is not recovering its costs of service.

13. Xcel asserts that the rates for Golden Spread reflect the pass through of SPP administrative charges which the Commission approved in the December 17 Order. Xcel argues that a five-month suspension results in a windfall for Golden Spread since it will continue to avoid paying its share of SPP administrative charges.

14. Finally Xcel contends that the imposition of a five-month suspension period is inconsistent with the Commission's policy of encouraging transmission investment to achieve competitive generating markets. Xcel argues that a five-month suspension serves as a disincentive to new construction, which is contrary to the Commission's policy of increasing power supplies and reliability and reducing bottlenecks. Xcel argues that a refund requirement by itself would protect transmission customers and a five-month suspension is unnecessary.

2. Discussion

15. The Commission's decision to suspend and set a proposed rate for hearing is based upon: (1) a review of the company's rate filing, necessarily – due to the need to act within a statutorily-mandated limited time – without the benefit of discovery or cross-examination or responsive testimony which may identify the underlying details which support the filing or which may demonstrate errors or other flaws in the rate filing; (2) an evaluation of the arguments and supporting documents filed by the intervenors, also necessarily without the benefit of discovery, cross-examination or responsive testimony; and (3) a preliminary analysis developed by the Commission's advisory staff. Moreover, this preliminary analysis must typically be made within, as in this case, sixty days.³

³ See *West Texas Utilities Co.*, 18 FERC ¶ 61,189 at 61,374 (1982) (*West Texas*); *accord, e.g., Pennsylvania Electric Co.*, 20 FERC ¶ 61,401 at 61,817 (1982) (*Pennsylvania Electric*); *Southern California Edison Co.*, 20 FERC ¶ 61,129 at 61,285 (1982) (*SoCal*).

16. In addition, when the Commission suspends and sets a proposed rate for hearing and settlement judge procedures, as in this case, the Commission is not making a final determination as to the reasonableness of the proposed rates, but rather indicates that a final determination of the reasonableness of the proposed rates requires the development of an evidentiary record.⁴ Consequently, the Commission's order merely decides whether the rates should be suspended at all (and if so, for how long) and set for hearing and settlement judge procedures in order to allow for a subsequent determination of justness and reasonableness.

17. The Commission's preliminary analysis of a rate filing is a rough, first-cut review performed within a statutorily-mandated limited time on the basis of then-available information. A discussion of that analysis at that early date would involve an inappropriate prejudgment of the merits of the issues being set for hearing and settlement judge procedures. In this case the Commission indicated that its preliminary analysis found that the proposed rates, including those charged to Golden Spread, may be unjust and unreasonable *and* substantially excessive. This is why the Commission suspended the proposed rates for five months.

18. Xcel argues that the Commission should have provided an explanation and delineation of the basis for its determination that the rates were substantially excessive sufficient to warrant a five-month suspension. However, as the Courts of Appeals have recognized, the very purpose of the hearing is to allow the Commission the opportunity to determine whether the proposed rate change is reasonable, and it is unreasonable to expect the Commission to provide at such an early stage of a proceeding a detailed explanation of its reasons for suspending a proposed rate change or of the various factors that lead to the choice of a particular suspension.⁵

⁴ *Jersey Central Power & Light Co.*, 56 FERC ¶ 61,376 at 62,435 (1991) (*JCP&L*); *Pennsylvania Electric*, 20 FERC at 61,817; *SoCal*, 20 FERC at 61,285.

⁵ *Boroughs of Ellwood City*, 701 F.2d 266, 271 (3rd Cir. 1983); *Cities of Anaheim v. FERC*, 723 F.2d 656, 661-62 (9th Cir. 1984); *Otter Tail Power Company v. FERC*, 583 F.2d 399, 408 n.38 (8th Cir. 1978), *cert. denied*, 440 U.S. 950 (1979); *Papago Tribal Utility Authority v. FERC*, 628 F.2d 235, 243 (D.C. Cir. 1980); *see also Connecticut Light and Power Company v. FERC*, 627 F.2d 467, 472 (D.C. Cir. 1980); *accord, e.g., New England Power Company*, 53 FERC ¶ 61,268 at 62,056-57 (1990); *Boston Edison Co.*, 55 FERC ¶ 61,087 at 61,256 & nn.10-11 (1991); *JCP&L*, 56 FERC at 62,435-36.

Docket No. ER04-1174-003, *et al.*

6

The Commission orders:

Xcel's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.